

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

DEVON C. DAVIS,

Plaintiff,

v.

JOHN DOE, et al.,

Defendant.

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Case No. CIV-20-978-SLP

ORDER

Plaintiff, a federal prisoner appearing pro se and in forma pauperis, brings this action pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Plaintiff alleges violations of his federal constitutional rights arising from a sexual assault by his cellmate while incarcerated at the Federal Transfer Center in Oklahoma City, Oklahoma. At the time Plaintiff filed his Complaint, he was incarcerated at FCI Beckley in Beaver, West Virginia. According to the Bureau of Prisons inmate locator,¹ as of this date, Plaintiff remains incarcerated at FCI Beckley.

Before the Court is the Report and Recommendation [Doc. No. 8] (R&R) of United States Magistrate Judge Suzanne Mitchell. Judge Mitchell recommends: (1) dismissal upon screening² of Plaintiff's Claim One, as to Defendant Wilson only, for failure to state

¹ Available at <https://www.bop.gov/inmateloc/>

² Plaintiff is proceeding in forma pauperis. See Order [Doc. No. 5]. Although not expressly referenced in the R&R, dismissal upon screening is proper pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

a claim; and (2) dismissal of Claim Two pursuant to Rule 8 of the Federal Rules of Civil Procedure unless, within twenty one days of this Court's Order, Plaintiff files an amended complaint to correct his pleading deficiencies. As Judge Mitchell noted, certain pages appeared to be missing from the Complaint making his claim "difficult to discern." *See* R&R at 1; *see also id.* at 3-5.

Judge Mitchell advised Plaintiff that any objections to the R&R were due by January 6, 2021. Plaintiff failed to timely file any objection to the R&R or request an extension of time within which to do so.

On January 14, 2021, the Court entered an Order and directed Plaintiff to submit the missing pages, or file an amended complaint, noting that screening of the Complaint would be more efficient when all attendant pages were before the Court. The Court gave Plaintiff until February 4, 2021 to correct his pleading deficiency or submit an amended complaint and advised Plaintiff that failure to timely comply with the Court's Order may result in the dismissal of this action without prejudice. *See Nitka v. Nelnet, Inc.*, 809 F. App'x 491, 495 (10th Cir. 2020) ("A district court may dismiss an action sua sponte '[i]f the plaintiff fails to prosecute or to comply with . . . a court order.'" (quoting Fed. R. Civ. P. 41(b))).

To date, Plaintiff has not objected to the R&R, responded to the Court's subsequent Order as directed, or sought an extension of time within which to do so.³ Accordingly,

³ The Court's docket reflects that the R&R was returned as "refused" and "unable to forward" on January 11, 2021. Plaintiff is responsible for providing notice of any change of address to the Court. *See* LCvR 5.4(a) (requiring written notice of a change of address and further providing that papers sent by the Court are "deemed delivered if sent to the last known address given to the Court."); *see also Theede v. United States Dep't of Labor*, 172 F.3d 1262, 1267-68 (10th Cir. 1999) (pro se plaintiff who failed to provide any change of address waived right to review of report and

upon review, the Court ADOPTS the R&R as to Plaintiff's Claim One against Defendant Wilson. Additionally, the Court finds Plaintiff's remaining claims against the remaining Defendants are dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b).


IT IS THEREFORE ORDERED that Plaintiff's Complaint is DISMISSED as follows:

1. Plaintiff's Claim One against Defendant Wilson is dismissed with prejudice for failure to state a claim upon which relief may be granted.
2. Plaintiff's remaining claims against the remaining defendants are dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b).

IT IS FURTHER ORDERED that Plaintiff's Motion to Appoint Counsel [Doc. No. 7] is DENIED as MOOT.

A separate judgment of dismissal shall be entered.

IT IS SO ORDERED this 25th day of February, 2021.


SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

recommendation by failing to make a timely objection); *Nitka*, 809 Fed. App'x at 495 (a pro se party is "required to use the district court's provided form to keep the court updated with his current address").